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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-70

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ALPERS' JOBBING COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

Petitioner seeks to invoke this Court's certiorari jurisdiction under 28 U.S.C. 1254(1). However, this Court lacks jurisdiction, because the petition for certiorari was not filed within ninety (90) days after the entry of the judgment, or even within the maximum 150-day period which may be authorized for good cause under 28 U.S.C. 2101(c).

The petition correctly states (p. 1) that the judgment of the court of appeals was entered on December 30, 1976. Accord-

ingly, the time to file a petition for certiorari expired on March 30, 1977; since the petition was not filed until July 12, approximately 3½ months later, it was filed out of time, and "must . . . be denied for want of jurisdiction." *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942). See *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923).

It is true, as the petition implies (p. 1), that a timely petition for rehearing, filed in the court below, would have suspended the running of the 90-day period. However, contrary to the assertion in the petition (p. 1), no *timely* petition for rehearing was filed.

The relevant chronology of events is as follows:

1976

12/30 Judgment entered.

1977

1/13 Time for filing petition for rehearing expired.

1/14 Time for filing petition for rehearing purportedly extended to January 27.

1/27 Time for filing petition for rehearing (pursuant to purported extension of January 14) expired.

1/31 Petition for rehearing received by clerk of court of appeals for the sixth circuit, who forwarded it to clerk of court below (App. 1, p. A-1, *infra*).[1]

[1] Matters set forth in the appendix to this brief in opposition are cited herein as "App. . . ."; matters set forth in the appendix to the petition for certiorari are cited as "Pet. App. . . ."; matters set forth in the appendix to petitioner's brief in the United States Court of Appeals for the Eighth Circuit (which apparently has been filed with this Court) will be cited as "R. . . .", following the form used in the petition for certiorari.

2/2 Petition for rehearing received by clerk of court below; clerk "decline[s] to file the untimely petition for rehearing" (App. 1, p. A1, *infra*).

2/18 Order of court of appeals "that the Clerk of this Court is directed to file the untimely petition for rehearing" (App. 2, p. A3, *infra*).

3/15 Petition for rehearing en banc, also considered as a petition for rehearing, denied (Pet. App. 29).

3/30 Time for filing a petition for a writ of certiorari expired.

6/6 Order signed by Mr. Justice Blackmun, purportedly extending time to file petition for writ of certiorari to July 13.

7/12 Petition for writ of certiorari filed.

It is apparent from the above chronology that the petition for rehearing was not timely filed. It was not lodged with the clerk of the court below until February 2, six days after expiration of the (previously extended) time for filing a petition for rehearing,[2] and was not even lodged with the clerk of the wrong (Sixth Circuit) court until January 31, four days late. It was not in fact filed until the court below ordered the clerk to file it on February 18, 21 days after expiration of the allowed time. In a motion for leave to file the petition for rehearing, petitioner requested leave to file the petition "out of time." The court's order of February 18, directing that it be filed, described the petition as an "untimely petition" (App. 2, p. A3, *infra*). The petition cannot properly be described as a "timely petition for rehearing."

[2] It would appear that the purported extension of time to January 27, ordered on January 14, was a nullity, because the time to file had previously expired on January 13. FRAP 40(a). However, because the petition was not filed within the time as purportedly extended, that point need not be developed here.

Any suggestion that this petition for certiorari is nevertheless timely, on the theory that the running of the 90-day period was suspended by the filing of the untimely petition for rehearing below, would be devoid of merit.

> "[W]here out of time petitions for rehearing are filed and the referee or court merely considers whether the petition sets out, and the facts—if any are offered—support grounds for opening the original order and determines that no grounds for a re-examination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order." *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 150 (1942).

Cf. FTC v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 211-212 (1952); *Isenberg v. Sherman*, 286 U.S. 547 (1932) (untimely petition to recall remittitur, argued, briefed and denied, did not extend time for petition for certiorari).

The order of February 18, directing the clerk of the court of appeals to file the untimely petition for rehearing, does not suspend the running of the 90-day period for certiorari. *Cf. Allegrucci v. United States*, 372 U.S. 954 (1963) (time for certiorari not suspended by entertaining of untimely petition for rehearing and denial "after due consideration"). If the petition for rehearing is not timely, the running of the statutory period will be suspended only if the court in fact re-examines the basis of the original order. See *Pfister, supra*: "When such a [untimely] petition for rehearing is granted and the issues of the original order are reexamined and an order is entered, either denying or allowing a change in the original order, the time for review . . . begins to run from that entry." 317 U.S. at 149. The mere denial of a motion to dismiss the petition for rehearing as out of time, or granting of a motion permitting the filing of the petition for rehearing, is not sufficient to suspend the running of the time for review. 317 U.S. at 151.

In this case there clearly was no such re-examination of the basis of the original order. In order to determine whether or not there was such a re-examination, one must inspect the order denying the rehearing. "It [the order] would show either a refusal to allow the petition for rehearing or a refusal to modify the original order." 317 U.S. at 150-151. In this case, the order denying rehearing (Pet. App. 29) shows simply a refusal to allow the petition for rehearing.

While the terms of the order itself are controlling, under *Pfister*, it is noteworthy that the circumstances support this interpretation of the order denying rehearing. Rule 40(a), FRAP, provides in part: "No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted, the court may make a final disposition of the cause without re-argument or may restore it to the calendar for re-argument or resubmission or make such other orders as are deemed appropriate under the circumstances of the particular case." Respondent was never requested, or even given an opportunity, to file an answer to the petition for rehearing. It is inconceivable that the Eighth Circuit would have in fact re-examined the basis of the original order, and made a new final determination of the merits of the case, without permitting counsel for respondent to file some form of answer to the petition for rehearing.

Further, it should be recalled that Rule 40(a), FRAP, requires that the petition for rehearing "shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended . . ." Yet the petition for rehearing merely re-argued the merits, without stating any point of law or fact which the court of appeals allegedly overlooked or misapprehended. It is small wonder that the petition was simply denied, without more.

These circumstances reaffirm the conclusion that the court of appeals did no more than "examine . . . the petition for

rehearing and determine . . . that [petitioner] had had full opportunity to present [its arguments]" and therefore denied the petition. *Pfister, supra*, 317 U.S. at 151.

It follows that the court below "did not re-examine the basis of . . . the original order . . . and that time for filing the petition . . . [for certiorari] was not extended." 317 U.S. at 151. Compare the analysis of this problem in *Papanikolaou v. Atlantic Freighters, Ltd.*, 232 F. 2d 663, 666-668 (4th Cir., 1956), cert. denied, 352 U.S. 828.

In this respect the case is quite different from *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131, 138 (1937), in which case, on supplemental petition for rehearing, the merits were fully re-examined, and the court made findings and announced conclusions of law with respect thereto. By the same token, the case is quite different from *Bowman v. Loperena*, 311 U.S. 262, 266 (1940), in which the court entertained an untimely petition for rehearing of the denial of a petition for review of a bankruptcy order, conducted a hearing thereon, and issued an order reciting that it had conducted a hearing on the merits, and denying the basic petition for review of the bankruptcy order. This fact also distinguishes *FPC v. Idaho Power Co.*, 344 U.S. 17, 20-21, and note 1 (1952), in which the court of appeals re-examined the merits and entered a new and different judgment; this Court noted that, "If the court did no more by the second judgment than to restate what it had decided by the first one, *Department of Banking v. Pink*, 317 U.S. 264, would apply and the 90 days would start to run from the first judgment."

Nor can it be seriously suggested that the order of Mr. Justice Blackmun on June 6, purportedly extending the time to file a petition for certiorari to July 13, resuscitated this litigation. The order was entered more than two months after the time for filing a petition for certiorari had expired, and this

Court at that time lacked jurisdiction to entertain a petition for certiorari, much less to extend the time for filing one. *Cf. Conboy v. First National Bank of Jersey City*, 203 U.S. 141, 145 (1906).

QUESTION PRESENTED

The question purportedly presented by the petition for certiorari (p. 2) is not presented by this record, as will be shown below.

STATEMENT

The statement in the petition (pp. 3-8) does not adequately present the facts. They will be restated below.

A. Proceedings Below

Although this case came to the court of appeals on the employer's petition to review an order of the National Labor Relations Board, directing the employer to bargain collectively with the union, the issue presented arises out of the underlying election proceeding.

1. The Election Proceeding

Alpers' Jobbing Company (respondent here) is a shoe warehousing company in St. Louis, Missouri, with approximately 15 employees as of April, 1975 (R. 46; Pet. App. 45). On February 25, 1975, Teamsters Local Union No. 688 filed a petition for election at Alpers' (R. 1). A consent election was conducted on April 4, 1975, at which three voters were challenged by the union (R. 8). The tally on the election day showed six votes for the union, three votes against the union, one void ballot, and three challenged ballots (R. 8).

Affidavits of the three challenged employees were taken to determine their eligibility to vote (R. 2-7). They were subsequently determined eligible (R. 12), and their ballots were opened. Two of their ballots were counted against the union, and one for the union, resulting in a final tally of seven votes for the union and five against (R. 14).

The employer filed timely objections to the conduct of the election, pointing out the facts set forth below, upon the grounds indicated below (R. 15). Simultaneously, the employer filed affidavits of Irvin Alper, the president of the company, and Sharon Sacus, an employee, and granddaughter of one of the three challenged voters (R. 19, 26). The Board's Field Examiner thereupon took affidavits of the three challenged employees (R. 29-38). The three employees in question, being dissatisfied with the refusal of the Board's Field Examiner to include in their statements the facts which they wanted to present, and especially the facts that they wanted to vote against the union, and did the best that they could to vote against the union, and felt strongly that they wanted their votes counted against the union, submitted further affidavits (R. 39-44).

The Regional Director recommended that the employer's objections to the conduct of the election be overruled (R. 45; Pet. App. 43). The employer filed timely exceptions to the Regional Director's Report and Recommendations presenting the arguments indicated below, and pointing out that the Regional Director's Report did not even purport to apply the applicable rule of law (R. 52-61).

The Board thereupon, without conducting a hearing, on August 4, 1975, upheld the Regional Director's Report, without discussion of the issues, and certified the union as the collective bargaining representative (R. 62-64; Pet. App. 52-54).

2. **The Unfair Labor Practice Proceeding.**

On or about August 27, 1975, the employer told the union that the employer believed that the certification was invalid, and that the employer was very much dissatisfied with that certification, and with the failure of the National Labor Relations Board even to hold a hearing, or to acknowledge the employer's brief before the Board or the cases cited in the brief, or to give any weight to the desires of the employees, and that the employer would like the union to cooperate in accelerating an appropriate proceeding to obtain judicial review of the certifications. Following further communications between the union and the employer, the employer respectfully declined to meet with the union, and to recognize the union as the exclusive bargaining agent for the employees, in order to establish a procedure by which to obtain judicial review of the certification (R. 72).

On September 19, 1975, the Union filed a charge under § 8 (a) (5) of the National Labor Relations Act, 29 U.S.C., § 151 *et seq.*, charging that the employer had refused to bargain in good faith (R. 65). A complaint was promptly issued on September 29, 1975, alleging a refusal to bargain in violation of § 8(a)(5)(R. 66-69).

The employer filed an answer admitting the above details, and alleging the matters set forth below, and alleging that the true and correct result of the election was "no union" (R. 73-74). Specifically incorporated in the answer by paragraph 14 thereof (R. 73) were supplemental affidavits of the three challenged employees (R. 75-80).

Subsequently, at the invitation of the Board agent, in order to clarify erroneous allegations of the complaint, and simplify the papers for review, the employer filed an amended answer, reaffirming and incorporating all of the matters set forth in its original answer, including the attached affidavits (R. 81).

Without any hearing, or any further filing of any papers, the General Counsel filed a motion for summary judgment (R. 83). The Board ordered the proceeding transferred to the Board, and gave the employer notice to show cause why summary judgment should not be granted (R. 85). The employer filed a response to that order, pointing out that the employer had never been given a hearing respecting its objections to the conduct of the election; that the employer was entitled to a hearing; that the motion for summary judgment did not even attach the affidavits which were filed with the Regional Director prior to the certification, in conjunction with the objections; that denial of a hearing deprives the employer, and the employees, of due process of law, in violation of the Fifth Amendment; that the certification was invalid and incorrect for the reasons indicated below, and resulted from an unconstitutional procedure which deprived the employer and the employees of a hearing, and various other objections (R. 86-87).

On February 9, 1976, the Board issued its Decision and Order, rejecting the employer's defenses without considering them, on the ground that the employer is not entitled to relitigate in an 8(a)(5) proceeding issues which were litigated in a prior representation proceeding (R. 91; Pet. App. 31, 34).

On February 19, 1976, the employer filed a petition for review in the court below (R. 99). After oral argument, the court below granted the petition for review and denied enforcement, on the ground that the totality of circumstances demonstrated that "the election procedure did not assure the fair and accurate expression" of the true desires of the employees (Pet. App. 17, 22, 25). The chronology of the subsequent untimely petition for rehearing is set forth at pages 2-3, *supra*.

B. Circumstances of the Election

Among the 15 employees of its shoe warehousing business, Alpers has maintained several elderly men, who work substantially less than a 40-hour week (R. 9-10). Three of these elderly men are the subject of this controversy.

Sam Melinas is 69 years old, and works approximately 29 hours per week (R. 10). He is totally unable to read or write English (R. 20, 44, 79), and has only a limited understanding of spoken English (R. 20). Indeed, when he first signed an affidavit for the NLRB Field Examiner, it was necessary to read the affidavit to him, and his effort to make his signature (R. 3) is totally illegible in English, although it presumably resembles his name in Yiddish, of which he reads only a little, if any (R. 20). His signatures on other affidavits are equally illegible (R. 34, 44, 80). His comprehension of anything outside his daily experience, communicated even in Yiddish, is extremely limited (R. 20). Before the election Mr. Alper explained to him that "Yes" has three letters and "No" has two letters, but it is questionable whether he understood (R. 20). He is highly nervous and excitable, and has never voted for or against anything, or any person, in his life (R. 20, 80). He was told before the election that he could vote against the union by placing a mark on the right-hand side of the ballot, and he did that to the best of his ability (R. 44, 79). If the ballot was handed to him upside down, he would still put the X on the right-hand side of the ballot, because he wanted to vote against the union (R. 79).

Louis Sacus is 63 years old, and works approximately 29 hours per week (R. 10). He cannot read or write very well, and cannot see very well without his glasses, which he forgot and left at home on the day of the election (R. 21, 27, 75). His understanding is extremely limited. His granddaughter, Sharon Sacus, explained to him approximately three times in the week before the election what "yes" and "no" meant on the ballot, and which

side of the ballot was "yes" and which was "no," but she didn't know whether he really understood it or not after she had explained it to him (R. 32). He is virtually illiterate (R. 21). Notwithstanding repeated explanations of the form of the ballot, on the day before the election Louis Sacus was still so confused that he thought that "no" was on the left side of the ballot (R. 21). He has virtually no understanding of the election process, and virtually no ability to cope with written documents (R. 22). Mr. Alper also explained to him two or three times before the election that "yes" has three letters, and "no" has two letters (R. 35), but it must be questioned whether that explanation was really effective. He was very confused at the time of the election, and attempted to put an X on the right side of the ballot, but if the ballot was handed to him upside down, he would still put the X on the right side (R. 75-76).

Marshall Dubinsky is 66 years old, and works approximately 24 hours per week (R. 9-10). He is not so illiterate as Sam Melinas and Louis Sacus, but he has a very limited command of the English language, and very little understanding of the election process (R. 22). He is a very excitable person, and is easily upset (R. 22, 32, 40, 77-78).

All three of these men believed that they had nothing to gain by having a union in the shop, and were firmly opposed to the union from the beginning of the organizational campaign (R. 26-27, 39, 41, 43, 75-76, 77-78, 79-80). They are all on Social Security, Medicare and Medicaid, and are confident they will be replaced by younger workers if the union comes into the shop (R. 76, 78, 79). Indeed, Marshall Dubinsky, a man of extremely limited understanding (R. 22, 29), but able to write a little, felt so strongly that he refused to sign his affidavit of June 4, 1975 until he was permitted to write in, in his own handwriting, "I don't want no union" (R. 40). All three were determined to vote against the union as best they could, and they were distressed when the Board's Field Examiner declined to

include these facts in the statements he took from them on June 3 (R. 40, 42, 44, 76, 78, 80).

Prior to, and at the time of, the election, the Board did nothing to enable these three men to express their free choice accurately (R. 30). No ballot was provided in Yiddish. No effort was made to assist them in voting, so that the ballot would in fact reflect their desires.

The election was held, in part, in a relatively open area towards the rear of the shop at 1419 Martin Luther King Drive in St. Louis (R. 27). When Marshall Dubinsky went to vote, the union observer challenged him in a very loud voice, which could be heard throughout the shop. Dubinsky was very excited, nervous, and upset by the union observer's loud and belligerent conduct (R. 28, 37, 40, 78). He did not understand what a "challenge" meant in the context of a union election, and thought that the union observer was challenging him to fight (R. 37, 77). Dukinsky turned and put up his fists, and said "wait till I come out" (R. 77, 32, 37). When order was restored, Dubinsky proceeded to attempt to vote, but he was very confused and upset (R. 78).

Sam Melinas heard this altercation, didn't understand it (R. 34, 38), and was upset and frightened by it (R. 23, 44). He went in to vote right after Dubinsky (R. 34). He, too, was challenged by the union observer, and there was a lot of talk, and he did not understand what it was all about, and didn't know what a challenge meant (R. 33). With all the confusion, even if he could read or write English, he would have been mixed up, because he is a very nervous person and has never voted in his life (R. 80, 44).

Louis Sacus was very nervous, confused, and upset at the time he voted (R. 42, 75). Not being able to read well at best, he forgot his glasses on election day (R. 21, 27, 75). The union

observer also challenged him, but Sacus didn't understand what the union observer was talking about (R. 30).

All three men did the best that they could, with their limited abilities and understanding, to vote against the union (R. 40, 77-78; 42, 75-76; 44, 79-80). But all three were bewildered by the challenge and the manner in which it was made, and did not understand it (R. 23). When the three challenged ballots were opened, one ballot had an X within the square under the "yes" (R. 47).

REASONS FOR DENYING THE WRIT

There are at least four good reasons for denying the writ.

1. **This Court Lacks Jurisdiction.**

This point is explained under the heading "Jurisdiction" at pages 1-7, *supra*. If the writ should nonetheless be granted, it will have to be dismissed eventually, as improvidently granted. This small employer should not be put to the further expense of briefing and arguing the merits; the writ should simply be denied.

2. **The "Question Presented" by the Petition Is Not Presented by This Record.**

"[T]he duty of the Board [is] to establish the 'procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.' " *N.L.R.B. v. Savair Mfg. Co.*, 414 U.S. 270, 276 (1973). See also *N.L.R.B. v. Tower Co.*, 329 U.S. 324, 330 (1946).

This Court went on in *Savair* to acknowledge that, of course, the Board has a wide discretion in this area. But the Court emphasized that special precautions are required where "two opposed groups are in contention: one composed of those who want a union and the other, of those who prefer not to have one." 414 U.S. at 277. "Any procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it." *Id.* at 278.

As this Court stated in *N.L.R.B. v. Tower Co.*, 329 U.S. 324, 331: "[T]he board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded *accurately*, efficiently and speedily [emphasis added]." "An election can serve its true purpose only if the surrounding condi-

tions enable employees to register a free and untrammeled choice for or against a bargaining representative . . . it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 N.L.R.B. 124, 126-127 (1948). See also *N.L.R.B. v. Payless Cashway Lumber Store*, 508 F.2d 24 (8th Cir. 1974).

In determining whether this standard has been met, as the court below recognized (Pet. App. 17, 22), it is necessary to consider the cumulative effect of all of the circumstances bearing upon the election, or the "totality of the circumstances." *LaCrescent Constant Care Center, Inc. v. N.L.R.B.*, 510 F. 2d 1319, 1324 (8th Cir. 1975); *N.L.R.B. v. Decoto Aircraft, Inc.*, 512 F. 2d 758 (9th Cir. 1975), cert. denied, 423 U.S. 836, *N.L.R.B. v. Janler Plastic Mold Corp.*, 82 LRRM 2174, 2176-77 (7th Cir. 1972).

Thus, the question presented by the employer's objections to the conduct of the election (R. 15-18), and the only question which could be presented or decided below, was whether the *totality of circumstances*, as shown by the record, indicates that this rigid standard has not been met. The "totality of circumstances" includes far more than simply "that a voter may have made a mistake in marking his ballot," as the question is stated by petitioner (p. 2). That totality of circumstances includes:

1. The extremely limited capacity (borderline at best) of the three elderly men in question;

2. The loud, belligerent conduct of the union observer, which upset and confused the men, pushing one of them over the borderline;

3. The fact that the Board gave no assistance to the men in attempting to register their preference;

4. The undisputed fact that the men were strongly opposed to the union, did everything they physically could to vote against the union, and are outraged to find that one of their ballots is being counted for the union; and

5. The fortuitous segregation of their three ballots, so that it can easily be demonstrated that one of them is an error.

All of these circumstances are shown by this record, and all are a part of the "totality of circumstances."

From the beginning, the Board has persistently refused to recognize what the issue is. In his Report on Objections and Recommendations (Pet. App. 43-51) the Regional Director insisted upon separating the limited capacity of the three men from the loud, belligerent conduct of the union observer, treating each point separately, and concluding that neither point alone justified setting aside the results. The employer, in its Exceptions to that Report (R. 52), bitterly protested this separation of the circumstances into two separate, independent pigeonholes, and this refusal to consider the totality of circumstances (R. 55). Nevertheless, the Board affirmed that Report without written opinion, refusing to acknowledge the existence of the principal cases cited by the employer in its Exceptions, and refusing to apply, or even to acknowledge the existence of, the applicable rule of law (R. 63; Pet. App. 52). This alone would require that enforcement be denied. *E.g., Teamsters Local Union 679, etc. v. N.L.R.B.*, 532 F. 2d 1385 (D.C. Cir. 1976).

In the unfair labor practice proceeding which followed, the Board again refused to consider the applicable rule of law in any way, simply ruling that the issues litigated in the representation proceeding may not be relitigated in the unfair labor practice proceeding (R. 91; Pet. App. 31, 34). It was not until the case reached the court of appeals that the employer was able

to persuade any governmental official or tribunal to apply to this case the applicable rule of law. That court expressly recognized the applicable rule (Pet. App. 22), and pointed out the various circumstances which constituted the "totality of circumstances," including the limited capacity of the men (Pet. App. 18, 23), the strong opposition of the men to the union (Pet. App. 18-19, 22-23), the loud, belligerent and upsetting conduct of the union representative at the election, in the presence of at least two of the men (Pet. App. 19, 23, 25) and the certainty that one of them made a mistake (Pet. App. 20, 22-24, 25).

In light of the history of the litigation, the Board's persistence in willfully misstating the issue is sheer flummery.

3. **Petitioner Is Asking This Court to Review the Evidence and Find the Facts, on Review of a Summary Judgment.**

From a reading of the argument portion of the petition, one would never guess that this case was decided by the Board on summary judgment. Petitioner patronizingly observes that the court below "chose to credit the post-election affidavits" (p. 13); petitioner quibbles about "the most that legitimately can be inferred from the Union's challenges" (p. 13); petitioner apparently draws some (mysterious) inference from the fact that the ruckus at the polling place lasted "about two minutes" (p. 15); petitioner complains that some statements in some affidavits allegedly "are contradicted" by other statements and other affidavits, apparently asking this Court to conclude that one is correct and the other incorrect (p. 14); and petitioner complains that statements made in some affidavits did not appear in earlier affidavits from the same persons, apparently suggesting that the later affidavits should be discredited (p. 14, n. 7).

(The latter point is explained by the affidavits themselves. The three men in question politely explained that the Board

agent who took the earlier affidavit "did not include the foregoing facts in that statement" (R. 40, 42, 44). They could have said more precisely, and would say if they could ever get a hearing, that the Board agent refused to include those facts, even though he was requested to do so.)

The place to resolve disputed facts, and to explore the possible inferences to be drawn therefrom, is at a full and fair hearing, including oral testimony and cross-examination. This is what the employer, and the three men in question, have been pleading for, for more than two years. The Board has persistently refused to conduct a hearing.

When the Board denies a hearing, of course the facts presented in the respondent's affidavits must be taken as true on appellate review. Due process requires no less. *Morgan v. United States*, 304 U.S. 1, 14-15 (1938); *N.L.R.B. v. Staiman Bros.*, 466 F. 2d 564, 567 (3d Cir. 1972); *N.L.R.B. v. Bata Shoe Co.*, 377 F. 2d 821 (4th Cir. 1967), cert. denied, 389 U.S. 917. The petition for certiorari makes it clear that the Board in fact chose to discredit the affidavits; that alone is sufficient to require that enforcement of the bargaining order be denied.[3]

This Court need not spend its time attempting to unravel allegedly disputed factual questions and inferences, when the Board has repeatedly refused to hold a hearing to establish the facts. Nor need this Court grant certiorari in order to teach the Board what a summary judgment is; the courts of appeals are steadily pounding that lesson home.[4] As the courts of ap-

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[3] If it be suggested that the court below might have remanded the matter to the Board with instructions to hold a hearing, as was suggested by the court below in oral argument, it should be noted that the Board's counsel flatly refused to accept such a remand, stating in substance that the Board would not hold a hearing on remand.

[4] A sampling (not inclusive) of recent cases in which the courts of appeals have set aside the Board's persistent abuse of the summary

peals continue their vigilant oversight, it may be expected that the Board will eventually conclude that the summary judgment procedure may not lawfully be used as a bludgeon with which to subdue those employees who choose not to support the union.

4. The Case Depends on Its Unique Facts, and Presents No Important Question of Federal Law Which Needs to Be Settled by This Court.

As the court below pointed out, this case presents "unique circumstances surrounding the election" (Pet. App. 18), or "unique facts" (Pet. App. 23). Accordingly, the ruling below "is a narrow one" (Pet. App. 25). These are understatements; in fact, this case is a freak.

When one considers the totality of circumstances (as the Board has persistently refused to do), they are freakish. It is only the circumstance that the union challenged these three men that led to the segregation of those three ballots from all the others; it was that fact which demonstrated that one of these three men had, in fact, utterly failed to record his preference. None of the lawyers who have worked on this case in the last two years has found any similar case.

Putting aside that unique fact, the remaining facts are somewhat analogous to those in two reported cases, where the circumstances have merely *suggested* that the voters were not able to cope with the written ballot. In both cases, the election was set aside. In *Fibre Leather Mfg. Corp.*, 167 N.L.R.B. 393 (1967), the Board had even provided bi-lingual observers, but had failed to notify the foreign language employees of the availability of assistance from the bi-lingual observers, and the employees failed to request assistance. The Board held:

> "[W]e are not satisfied that the conditions under which the election was conducted were such as to assure the effective and informed expression by all employees of their true desire." 167 N.L.R.B. at 393.

In *Marriott In-Flite Services Division of Marriott Corp. v. N.L.R.B.*, 417 F. 2d 563 (5th Cir. 1969), cert. denied, 397 U.S. 920 (1970), the Board failed to provide ballots in Spanish for an election in which approximately one-third of the eligible employees spoke only Spanish. Even though the Board had provided bi-lingual election notices, and Spanish-speaking officials at the polls, and even though the union won the balloting, 299 to 203, the Fifth Circuit set aside the election. "An election in which one-third of the electorate has no access to ballots in language that it can understand necessarily falls below the minimum laboratory standards of fairness . . . what comprises fairness to the minority in the one case [political elections] does not necessarily define fairness to the minority in the other [NLRB elections] . . . [The Board] must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily." 417 F. 2d at 567, 568.

If the court below had ruled against the employer, its rationale would inevitably have conflicted with the *Fibre Leather* and *Marriott* decisions. But that is not the case.

Petitioner states that the Board conducted 8,899 elections in a recent fiscal year (p. 15). In the last 44 years, one may suppose

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judgment procedure includes *Henderson Trumbull Supply Corp. v. N.L.R.B.*, 501 F. 2d 1224, 1230 (2d Cir., 1974); *N.L.R.B. v. Staiman Bros.*, 466 F. 2d 564, 567 (3d Cir., 1972); *N.L.R.B. v. Smith Industries, Inc.*, 403 F. 2d 889, 893 (5th Cir. 1968); *N.L.R.B. v. Mr. Fine, Inc.*, 516 F. 2d 60, 63 (5th Cir. 1975); *Argus Optics v. N.L.R.B.*, 515 F. 2d 939 (6th Cir. 1975); *N.L.R.B. v. Janler Plastic Mold Corp.*, 82 LRRM 2174, 2176-77 (7th Cir. 1972); *N.L.R.B. v. Southern Paper Box Co.*, 473 F. 2d 208, 211 (8th Cir. 1973); *Alson Mfg. Aerospace Div. of Alson Industries, Inc. v. N.L.R.B.*, 523 F. 2d 470, 472 (9th Cir. 1975); *Excelsior Laundry v. N.L.R.B.*, 409 F. 2d 70, 72 (10th Cir. 1968).

that the Board must have conducted hundreds of thousands of elections. If the decision below really constituted "a serious departure from established principles" (Pet. p. 8), out of all those elections surely petitioner could have found at least one circuit court decision in conflict with the decision below. Significantly, petitioner has found none. That is because the decision below correctly applies the established rules of law.

Petitioner contends that "the Board has adopted the general principle that clearly-marked [sic] ballots may not be impeached by post-election statements or other evidence indicating that the voter made a mistake or acted under a misunderstanding" (p. 9). If this means that the probability, or certainty, that the ballots failed to reflect the true intent of the voters accurately is not relevant on post-election objections, then this contention is repudiated by the *Fibre Leather* and *Marriott* decisions, *supra*, and is not supported by the cases cited by petitioner at page 9, note 3.[5] Clearly an election

[5] In *McFarling Bros. Mid-State Poultry & Egg Co.*, 123 N.L.R B. 1384 (1959), several employees presented affidavits generally to the effect that they had not taken the election seriously, and that they would vote differently if they had it to do over again; the Board simply held that the affidavits were insufficient "to rebut the presumption that all voters expressed their true choice by their clearly marked ballots" (123 N.L.R.B. at 1385); the implication is that more persuasive evidence would have rebutted the presumption. In *V. LaRosa & Sons, Inc.*, 121 N.L.R.B. 671 (1958), the Board simply found that an allegedly confusing designation of the union on the ballot was not really confusing; there was no contention that a disturbance in the polling place had so upset the voters that they were unable to vote their true preference. In *Johnson City Foundry & Machine Works, Inc.*, 71 N.L.R.B. 825 (1946), the Board again emphasized that the employer in that case did not even contend that any conduct on the part of the Board's agents or the union's agents caused any mismarking of the ballots, stating that "no circumstances have been presented here to warrant departure from our normal policy" (71 N.L.R.B. at 828). In *T & G Manufacturing, Inc.*, 173 N.L.R.B. 1503, 1504 (1969), the union and the employer by stipulation attempted to withdraw a ballot which had been put into the ballot box, thereby depriving the employee of his vote, and in addition thereby imposing on the Board the impossible task of attempting

should be set aside if the totality of the circumstances establishes that the tally *probably* does not reflect the true intent of the voters, as is shown by *Fibre Leather* and *Marriott;* that rule alone would be sufficient to dispose of this case. This record adds additional proof that the tally *certainly* does not reflect the true intent of the voters; surely that additional proof cannot cause the election tally to be validated.

Apparently the Board is arguing here, as it did below, that statements regarding how an employee voted or intended to vote may not ever, under any circumstances, be admitted as evidence in support of objections to the conduct of election. The cases cited in support of that proposition are adequately distinguished by the court below (Pet. App. 24-25). In fact, no such blanket rule exists. For example, in *Necco Sales Corp.*, 119 N.L.R.B. 155 (1957), the statements of the employees as to how they voted, and how they intended to vote, were accepted and considered; the election results were upheld, not because such evidence is inadmissible, but because "there is no indication that the voters were unduly rushed or handicapped in casting their ballots" (119 N.L.R.B. at 156). And in *N.L.R.B. v. Titche-Goettinger Co.*, 433 F. 2d 1045, 1048 (5th Cir. 1970), the Fifth Circuit denied enforcement of the Board's order to bargain, relying in part upon the affidavits of two voters declaring their intention to vote against the union.

In other cases the Board and the courts have lamented the absence of such evidence. For example, in *N.L.R.B. v. Griffith Oldsmobile, Inc.*, 455 F. 2d 867 (8th Cir. 1972), the court enforced the Board's order against the employer, em-

to determine which of the ballots in the box was the one cast by that employee; for once, the Board protected the employee and refused to let the union and the employer jointly dispose of his vote by stipulation. None of these cases establishes the proposition that an employee may not be heard to complain that his ballot is not being counted as he attempted to vote. (The *LaRosa* and *Johnson City* cases are being cited here for the first time in this litigation.)

phasizing the shortcomings of the employee affidavits on which the employer relied: "Nor did they state that they had voted for the union in the election" (455 F. 2d at 871). In *N.L.R.B. v. White Knight Mfg. Co.*, 474 F. 2d 1064, 1068 (5th Cir. 1973), the Board upheld the election tally, emphasizing the lack of evidence that any of the voters "were unable to vote their personal preferences in the election." In the *McFarling* case cited at page 22, n. 5, *supra*, the employee affidavits were substantially to the effect that they wished that they had voted differently; in upholding the election tally, the Board emphasized the lack of evidence "to rebut the presumption that all voters expressed their true choice by their clearly marked ballots." 123 N.L.R.B. at 1385. In *Palm Container Corp.*, 117 N.L.R.B. 434, 436 (1957), the Board overruled objections to the election based upon failure to explain the nature of the balloting to Spanish-speaking employees and illiterates, emphasizing again that "there is no evidence whatever of any employee who has claimed that his ballot, as marked, did not express his true intent."

Of course the employer should not be permitted to coerce the employees to state that they had voted against the union. If any such coercion occurs, it may be assumed that the Board will vigilantly protect the employee. But here there was no coercion. There was not even any questioning by the employer. In this case the employee has come forward voluntarily, and is insisting that he be heard. When all of the surrounding circumstances demonstrate that he has made his anti-union views known to all concerned from the very beginning, and his ballot has been so segregated that it is clear that his ballot does not reflect his true intent, and the disturbance at the polls pushed him across the boundary of incompetence, there is no rule of law that prevents him from testifying.

CONCLUSION

The decision below is clearly correct. It rests upon a unique set of facts, as petitioner implicitly acknowledges by arguing that the affidavits must be discredited. On this unique set of facts, the decision resolves no important question of federal law with any significance for the future.

In any event, this Court lacks jurisdiction, and the "question presented" in the petition for certiorari is not in fact presented on this record.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX 1

United States Court of Appeals
For the Eighth Circuit
St. Louis, Mo. 63101

February 2, 1977

Robert C. Tucker, Clerk

Mr. Elliott Moore
& Ms. Carol A. DeDeo
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Re: 76-1131. Alpers' Jobbing Co. v. NLRB

Dear Counsel:

I have today received, from the clerk of the United States Court of Appeals for the Sixth Circuit, petition for rehearing, presumably in this case. The petition is entitled "In the Sixth Circuit" and was obviously sent to the clerk of the Sixth Circuit in error.

An order was entered in this case on January 14 providing that the Board might have to and including January 27 in which to file petition for rehearing. The petition bears a "received" stamp showing that it was received by the clerk of the Sixth Circuit on January 31.

Under the circumstances I decline to file the untimely petition for rehearing.

You may, if you like, file some sort of appropriate motion with us seeking to have the petition for rehearing filed out of time.

Very truly yours,

Robert C. Tucker
Clerk

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copy

Mr. Lewis C. Green
Mr. Clyde C. Craig
Mr. Joseph H. Solien

APPENDIX 2

United States Court of Appeals
For the Eighth Circuit

76-1131 September Term, 1976

Alpers' Jobbing Company, Inc., Petitioner, vs. National Labor Relations Board, Respondent.	Petition for Review of Order of the National Labor Relations Board

For cause it is now here ordered that the Clerk of this Court is directed to file the untimely petition for rehearing tendered by counsel for respondent in this cause.

February 18, 1977